Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 10240/2020

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 5 May 2022
Date of judgment: 11 May 2022

In the matter between:

CHOISY-LE-ROI OWNERS (PTY) LTD	Applicant
and	
THE MUNICIPALITY OF STELLENBOSCH	First Respondent
THE MUNICPAL PLANNING TRIBUNAL OF THE MUNICIPALITY OF STELLENBOSCH	Second Respondent

JUDGMENT

BINNS-WARD J

[1] The applicant is the owner of an erf at Technopark in Stellenbosch. Technopark is an area that since 1996 has been specially zoned under the zoning schemes of the Municipality of Stellenbosch applicable from time to time for development and use as 'a technology or science park development where enterprises associated with research, development, design and related activities in the high-technology sector are accommodated in a park-type work environment which is specifically created for the industrial needs of the enterprise concerned'. The 'normal development' uses provided in terms of the zoning scheme are aligned with the concept so described. Permitted 'special development' uses are '[a]ny other usage which is incidental to the aforementioned character of the technopark'. The pertinent provisions of the most recently adopted zoning scheme (the 2019 Zoning Scheme Bylaw) remain faithful to the originally formulated concept.

[2] Apart from an hotel - the development of which was provided for in the original concept - there has up to now been no residential use development in Technopark. Residential use development is also not provided for in the pertinent zoning scheme provisions for the area. The anecdotal evidence is that the area has not been developed strictly in accordance with the original idea, with the result that Technopark currently manifests as a mixed-use office park. One of the recent major developments in Techno Park, for example, has been to provide the headquarters for a well-known retail bank.

[3] The applicant's property is still undeveloped and is currently used as a parking lot. The applicant applied in 2017 for the rezoning of its property to allow for a mixed-use building development including a residential component. The proposed development comprises of mixed uses on the ground floor and a number of duplex apartments on the two upper floors.

[4] The rezoning application enjoyed support from the planning officials charged with evaluating it. Their recommendation that it be approved was not unqualified, however. The officials considered that the residential component of the development should be limited to the top floor of the proposed building and be accompanied by a requirement that 2.5 parking bays per apartment be provided on site. The applicant is unwilling to

accept those conditions, which it contends would undermine the feasibility of its proposed development.

[5] The rezoning application came before the Municipal Planning Tribunal, a body established in terms of s 70 of the Stellenbosch Municipality Planning Bylaw of 2015.[1] Notwithstanding the relatively benevolent view taken by the planning officials, the Tribunal refused the application on 20 July 2018. In the reasons given for its decision, the Tribunal expressed its support for 'a new vision' for development in Technopark that might include alternative land uses, but decided that it would be inappropriate to introduce land uses not originally envisioned for the area before the municipal council adopted an amended policy concerning the future use and development of the area.

[6] The applicant thereupon lodged an appeal against the Tribunal's decision. The Executive Mayor is constituted as the appeal authority by s 79(1) of the Bylaw. Section 79(5) of the Bylaw enjoins the appeal authority to determine the appeal with regard to the provisions of s 65(1) 'read with the necessary changes'. The reference to 'the necessary changes' applies because the provision is the same one as that to which the Tribunal was required to have regard when it made the decision at first instance.

[7] Section 65(1) of the Bylaw provides:

> 'When the Municipality considers an application, it must have regard to the following:
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> (a) the application submitted in terms of this By-law;
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> (b) the procedure followed in processing the application;
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> (c) the desirability of the proposed utilisation of land and any guidelines issued by the Provincial Minister regarding the desirability of proposed land uses;
>
> (d) the comments in response to the notice of the application, including comments received from organs of state, municipal departments and the Provincial Minister in terms of section 45 of the Land Use Planning Act;

[1] Promulgated in PN 354/2015 dated 20 October 2015

(e) the response by the applicant, if any, to the comments referred to in paragraph (d);

(f) investigations carried out in terms of other laws that are relevant to the consideration of the application;

(g) a registered planner's written assessment in respect of an application for—

(i) a rezoning;

(ii) a subdivision of more than 20 cadastral units;

(iii) a removal, suspension or amendment of a restrictive condition if it relates to a change of land use;

(iv) an amendment, deletion or imposition of additional conditions in respect of an existing use right;

(v) an approval of an overlay zone contemplated in the zoning scheme;

(vi) a phasing, amendment or cancellation of a subdivision plan or part thereof;

(vii) a determination of a zoning;

(viii) a closure of a public place or part thereof;

(h) the impact of the proposed land development on municipal engineering services;

(i) the integrated development plan, including the municipal spatial development framework;

(j) the integrated development plan and spatial development framework of the district municipality, where applicable;

(k) the applicable local spatial development frameworks adopted by the Municipality;

(l) the applicable structure plans;

(m) the applicable policies of the Municipality that guide decision making.

(n) the provincial spatial development framework;

(o) where applicable, a regional spatial development framework contemplated in section 18 of the Spatial Planning and Land Use Management Act or provincial regional spatial development framework;

(p) the policies, principles and the planning and development norms and criteria set by the national and provincial government;

(q) the matters referred to in section 42 of the Spatial Planning and Land Use Management Act;

(r) the principles referred to in Chapter VI of the Land Use Planning Act; and

(s) the applicable provisions of the zoning scheme.'

[8] The appeal authority dismissed the appeal after an oral hearing. The time taken for the decision to be made on appeal materially exceeded that prescribed. That was regrettable, but it is not a consideration that in any manner affects the determination of the matter currently before the court, which is an application to review and set aside the decision of the appeal authority and to remit the matter for determination afresh in the light of the court's judgment.

[9] It is trite, but nevertheless worthy of reiteration that the court is not concerned in applications for judicial review with the merits of the impugned decision, but only with its legality. Thus, the fact that a decision might be set aside on review is no prognosticator that a different result will follow when the matter concerned is reconsidered by the relevant functionary upon remittal.

[10] There was, quite rightly, an acceptance on both sides that the impugned decision constituted administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000. In terms of s 7(1)(a) of that Act, applications for the judicial review of administrative action must be instituted without unreasonable delay and not later than 180 days after the date upon which proceedings in terms of any available internal remedy have been concluded. In the current case the period concerned coincided to some extent with the Covid-related lockdown. The applicant applied in terms of s 9 of PAJA for condonation, to the extent required, for the late institution of the proceedings. The first respondent did not object to condonation being granted. The only party potentially prejudiced by the delay is the applicant itself. It is clearly in the interests of justice for condonation to be granted and an order will issue accordingly.

[11] The grounds for judicial review relied upon by the applicant were identified, with reference to s 6 of PAJA, in its supporting affidavit as follows:

> That the decision was –
>
> 1. materially influenced by an error of law;
> 2. made because irrelevant considerations were taken into account and/or relevant considerations were not considered;
> 3. made arbitrarily;
> 4. not rationally connected to the purpose for which it was taken;
> 5. not rationally connected to the information before the appeal authority;
> 6. not rationally connected to the reasons given for it by the appeal authority; and
> 7. so unreasonable that no reasonable person could have so exercised the Appeal Authority's appeal authority.

The review was also founded on alleged procedural unfairness, but I have not found it necessary to consider that aspect of the application, which was in any event affected by disputes of fact on the papers.

[12] In the statement of reasons furnished for the appeal authority's refusal of the appeal, the Executive Mayor recorded that she had 'considered all relevant considerations' and that her 'failure to refer to something [did] not mean that [she] did not consider it'. It is apparent from the body of the reasons that the primary consideration underpinning the decision was the Mayor's understanding that the residential component of the proposed development was fundamentally at odds with the pertinent land use and development guidelines in the Municipality's 2019 spatial development framework ('MSDF').

[13] The essence of the appeal authority's reasoning is reflected in the following remarks by the Mayor concerning what she plainly considered to be the applicable content of the MSDF:

> 'I also must have regard to the municipal spatial development framework (MSDF) which applies at the time of deciding the appeal, namely the 2019 municipal spatial development framework. The 2019 MSDF should be interpreted in light of the history of that document.
>
> 10.1 A draft MSDF dated July 2019, which was submitted to Council for consideration, contained the following statement (p. 67):
>
> > 'Other infill opportunities also exist in Stellenbosch town, specifically in Cloetesville, Ida's Valley, Stellenbosch Central, along the edges of Paradyskloof and Jamestown. there are also opportunities to change the nature of existing places to become more "balanced" as local districts. <u>The Technopark, for example, can benefit from housing development for people who work there.'</u>
> >
> > (Emphasis added.)
>
> 10.2 However, when approving the 2019 MSDF on 11 November 2019, Council deleted the underlined sentence in the draft created above. The approved paragraph reads (p. 67):

‘Other infill opportunities also exist in Stellenbosch town, specifically in Cloetesville, Ida’s Valley, Stellenbosch Central, along the edges of Jamestown. There are also opportunities to change the nature of existing places to become more “balanced” as local districts.’

10.3 This indicates that Council does not consider that Technopark would benefit from housing development for people who work there.

10.4 The policy of Council towards residential development in Technopark is even more clearly shown by the following change in the paragraph dealing specifically with Technopark (p. 151 of both documents).

July 2019 draft submitted to Council

‘In terms of the MSDF, Technopark should be developed and managed to become a more “balanced” community. this will entail a specific focus on providing residential opportunity, enabling less vehicular movement to and from Technopark. Ideally, the landowners, managers, and municipality should work together to prepare a detailed LSDF for the area, aimed at establishing a more balanced community.’

2019 MSDF approved by Council:

‘In terms of the MSDF, Technopark should be developed and promoted to become an even more specialised zone for technological inventions and a hub for specialised business. Ideally all stakeholders should work together to create an environment where the special purpose of Technopark can be developed to its full potential.’

10.5 This is a clear rejection by Council - as recently as 11 November 2019 - of the proposal to permit residential use of Technopark. Instead, the approved MSDF contemplates that Technopark should be developed and promoted to become an even more specialised zone for technological inventions and a hub for specialised business and retaining and developing to its full potential the special purpose of Technopark.

10.6 The Council-approved MSDF similarly changed a reference in the draft from envisaging ‘Technopark as a balanced community, less reliant on a workforce commuting to and from the area on a daily basis’ to envisaging

'Technopark as a specialised business hub as described earlier' (p. 157). A similar change was made on p. 163 in response to a submission calling for an amendment of the zoning scheme to enable mixed use of Technopark.

11. Council rejected the proposed inclusion of residential used in Technopark notwithstanding submissions and reports (including Urban-Econ Development Economists 2004) which support such a change in land use.

12. The applicant contends that the Municipality's vision for Technopark is 'outdated'. Ultimately that is a matter for Council to decide and Council disagrees with the applicant.

13. In my view, Council's recent rejection of residential use for Technopark is a reasonable, rational and lawful means to realise a worthy objective that Technopark should be developed and promoted to become an even more specialised zone for technological inventions and a hub was specialised business and retaining and developing to its full potential the special purpose of Technopark.'

[14] The Mayor also regarded it as significant that the 2019 Zoning Scheme provided a Local Area Overlay for the Technopark and provided, in s 266(2), that '[t]he purpose of the Techno Park Local Overlay zone is to retain the development parameters applicable to this area, as they applied in the former Stellenbosch Zoning Scheme'.[2] In her reasons for refusing the appeal she noted that the zoning made no provision for residential use and concluded '[h]ad Council intended to permit residential use of Technopark it would have done so when establishing the Overlay Zone and formulating its development parameters'.

[15] The applicant contends that the Mayor's construction of the MSDF was misdirected and resulted in vitiating errors of law and in her making the impugned decision with regard to irrelevant considerations, while at the same time failing to have regard to the relevant ones. It was common ground, rightly so, that the proper interpretation of the MSDF is a question of law.

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[2] Stellenbosch Municipality: Zoning Scheme Bylaw, 2019, published in the Western Cape Provincial Gazette Extraordinary 8153, dated 27 September 2019.

[16] The applicant's counsel pointed out that the content of the MSDF was divided up into various sections, most of which were narrative rather than operative in character. Prime examples of what I have labelled as the narrative sections of the document include Section 1, titled 'Introduction', which merely explains what an SDF is, and Section 2, titled 'Legislative and Policy Context', which describes the legislative requirements for MSDFs and the various national and provincial policy documents with which the Stellenbosch MSDF is required to be consistent. The operative sections of the document – what applicant's counsel referred to as its 'business end' – is contained in Section 5 (pp. 61-100), titled 'Plans and Settlement Proposals', and Section 6 (pp. 101-136), titled 'Implementation Framework'. The document also has seven appendices, which, according to the heading given to appendices section, constitute the documents that were reviewed for the purpose of compiling the MSDF. The heading is 'List of Documents Reviewed'. Appendix B (pp. 149-185) is titled 'Public Comment Received Following Advertising of the Draft MSDF'.

[17] As mentioned, Section 5 of the MSDF addresses the Municipality's 'plans and settlement proposals'. In the introduction to the section (§5.1) it is explained that –

> 'Broadly – and aligned to the SPLUMA MSDF guidelines – the settlement plans entails (sic) three types of actions or initiatives:
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> - Protective actions – things to be protected and maintained to achieve the vision and spatial concept.
> - Change actions – things that need to changed, (sic) transformed, or enhanced to achieve the vision and spatial concept.
> - New development actions – new development or initiatives to be undertaken to achieve the vision and spatial concept.'

Part 5.1 concludes with the following statement: 'It is also the SM's [Stellenbosch Municipality's] intent to develop more detailed LSDFs or Precinct Plans for each of the settlements following adoption of the MSDF'.

[18] Part 3 of section 5 of the MSDF (at p.67) is devoted to plans and settlement proposals for 'Stellenbosch Town', the area in which Technopark is situated. The applicant's counsel pointed out that it contains the following statement after referring to 'infill opportunities' in Cloetesville, Ida's Valley and Stellenbosch Central and along the

edges of Jamestown: ‘There are also opportunities to change the nature of existing places to become more “balanced” as local districts’.

[19] At p. 69 of the MSDF, which is in §3 of Section 5, there appears Table 20, which is headed ‘Plan Elements and Proposals for Stellenbosch Town’. The Table is made up of four columns, headed, if one reads the page from left to right, (i) ‘Type of Action’, (ii) ‘SDF Element’, (iii) ‘Spatial Proposals’ and (iv) ‘Related Non-Spatial Proposals’. The column headed ‘Type of Action’ treats of three types of action, viz. ‘Protective Actions’, ‘Change Actions’ and ‘New Development Actions’. (The significance of each of those descriptors has been described in paragraph [17] above.) The ‘SDF Element’ column adjacent to ‘New Development Actions’ refers to ‘Significant new residential development’. Next to that, in the column headed ‘Spatial Proposals’, appears the following information:

- Support inclusive infill development on vacant public land within Cloetesville, Idas Valley, Central Stellenbosch and Jamestown.
- Support infill development on private land within Stellenbosch town in a manner which serves to compact the town, expand residential opportunity and rationalize the edges between the built and unbuilt areas.
- Support the further development of Techno Park as a balanced community, <u>emphasizing residential opportunity</u>.

(Underling supplied.)

[20] The forementioned information concerning Technopark in Section 5 of the MSDF is followed through in Section 6 (‘Implementation Framework’), which, as mentioned, is the other primarily ‘operative’ part of the MSDF. Part 6.1, s.v. ‘Introduction’ states ‘The SPLUMA guidelines require, as part of the MSDF, a high-level Implementation Framework setting out the required measures that will support adoption of the SDF proposals while aligning the capital investment and budgeting process moving forward. The MSDF Implementation Framework comprises the following sections: A proposed settlement hierarchy, Priority development areas and themes, A policy framework (linked to strategies), ...’ etc. Twelve sections of the Implementation Framework are

specified. Part 6.2 states, s.v. 'Proposed Settlement Hierarchy', 'the proposed settlement hierarchy for SM, supporting the special plan and proposals for the settlement as a whole, is outlined in Table 28.'

[21] Table 28 is part of §3 of Section 6 of the MSDF. It is titled 'Proposed Settlement Hierarchy'. It consists of three columns headed (from left to right on the page), (i) 'Settlement', (ii) 'Role' and (iii) 'Development and Land Use Management Focus'. 'Stellenbosch Town' is listed as one of the 'Primary Settlements' listed in the left-hand column under 'Settlements'. Adjacent to that listing, in the column headed 'Role', the following information is given: 'A significant centre comprising extensive education, commercial and government services with a reach both locally and beyond the borders of the municipality, tourism attractions, places of residence, and associated community facilities'. And then in the righthand column, s.v. 'Development and Land Use Management Focus':

- Broadening of residential opportunity for lower income groups, students and the lower to middle housing market segments.
- Upgrade of informal settlements.
- Retention of university functions in town.
- Enablement of the Adam Tas Corridor.
- Sensitive residential infill and compaction.
- Drive to established (sic) "balanced" precincts (e.g. Techno Park).
- public transport development, travel demand management, parking controls and NMT improvements.

(Underling supplied.)

The import of the word 'balanced' in the given context is evident when Table 28 is read together with related information in Table 20 (quoted in paragraph [19] above). In respect of Technopark, it involves a balance with an emphasis on 'residential opportunity'.

[22] The passage in the MSDF treated of by the Mayor in paras 10.4 and 10.5 of her statement of reasons for refusing the appeal appears in Appendix B to the MSDF,

which, as mentioned earlier, is titled 'Public Comment Received Following Advertisement of the Draft MSDF'.[3] The introductory paragraph to Appendix B reads as follows: 'The draft MSDF was advertised for public comment during March 2019, and again during May 2019. Comments received during both rounds are summarised in Tables 51 and 52. Several observations can be made related to the comments received, addressed under themes in the paragraphs below.' The passage quoted by the Mayor appears under a heading 'TechnoPark' and is one of the 'themes' referred to in the forementioned introductory paragraph of the Appendix.

[23] Table 51 lists the submissions received in response to the March 2019 invitation for public comment and Table 52 those received in the May and June 2019 rounds. Submission 49 listed in Table 51 is identified as an email submission by one Pieter Schaafsma concerning a number of issues concerning Technopark. Schaafsma is indicated as having suggested that the 'mobility issues' to which the then imminent development of a bank's headquarters at Technopark might be expected to give rise could be addressed by 'encouraging the bank to acquire and develop the remaining vacant land in the Technopark for higher density residential development for its employees and to convert certain of the existing office buildings that become vacant for the same purposes'. The 'Municipal Response' to the Schaafsma submission is recorded in Table 51 as follows: 'The MSDF argues that the TechnoPark should be developed/managed to become a specialised business hub. It is proposed that the land owners/management body and municipality prepare a local/precinct level plan aimed at achieving the abovementioned'

[24] Submission 50 listed in Table 51 was from the Stellenbosch Ratepayers' Association. It is reported also to have raised concerns about 'mobility issues' related to the development of a bank's headquarters at TechnoPark. The 'Municipal Response' to the Ratepayers' Association submission is recorded as follows: [First bulleted point] 'The MSDF supports a position where access issues to TechnoPark is (sic) resolved through its conversion to a more balanced community containing residential opportunity. Ideally, should further access improvements be required (particularly from the Baden Powell / Adam Tas area, this should be funded without concomitant release of

[3] The relevant passage in the Mayor's statement of reasons has been set out in paragraph [13] above.

agricultural land for development.' [Second bulleted point] 'It is recommended that the land owners /managers of TechnoPark and the Municipality undertake a joint planning exercise to plan the development of TechnoPark into a specialised business hub.'

[25] So much for the content of the gazetted MSDF as it concerns the Technopark area. My attention was not directed to any other part of the document that expressly related to the use, development and land management of Technopark.

[26] It is important to any exercise of interpretation of the MSDF to understand its place in the legislative framework regulating land use management and planning and local government. That is a relevant contextual consideration.

[27] A municipality is required, in terms of s 26(e) of the Local Government: Municipal Systems Act 32 of 2000, to compile a spatial development framework as part of the integrated development plan that must be adopted by every incoming municipal council after its election. A spatial development framework must 'include the provision of basic guidelines for a land use management system for the municipality'.

[28] An MSDF is an important instrument. Because it forms part of the municipality's integrated development plan, it is an integral feature of what is described, in s 35(1)(a) of the Systems Act, as 'the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality'. The municipality is required in terms of s 18 of the Western Cape Land Use Planning Act 3 of 2014 to publish notice of its adoption of any spatial development framework in the Provincial Gazette and, in terms of s 20, it must make the adopted framework 'accessible to the public'.

[29] A municipality is bound in the exercise of its executive authority by its integrated development plan.[4] Section 12(2)(b) of the Spatial Planning and Land Use Management Act 16 of 2013 ('SPLUMA') prescribes that a spatial development framework 'must guide and inform the exercise of any discretion or of any decision taken' in terms of the Act 'or any other law relating to land use and development of land' by the sphere of government that has adopted it. Section 22(1) of SPLUMA provides that a 'Municipal Planning Tribunal or any other authority required or mandated to make a land

[4] Section 35(1)(b) and s 36 of Act 32 of 2000.

development decision ... may not make a decision which is inconsistent with a municipal spatial development framework'.

[30] It bears mention in passing that s 7 of SPLUMA specifies as one of the principles that apply to spatial planning, land development and land use management (namely the 'principle of good administration') that 'policies, legislation and procedures must be clearly set in order to inform and empower members of the public'. Section 12(1)(g) of SPLUMA prescribes that a spatial development framework must 'provide clear and accessible information to the public and private sector and provide direction for investment purposes'. It is required 'to promote a rational and predictable land development environment to create trust and stimulate investment'[5] and 'provide direction for strategic developments, infrastructure investment, promote efficient, sustainable and planned investments by all sectors and indicate priority areas for investment in land development'.[6]

[31] The acting municipal manager deposed to the Municipality's answering affidavit. There was a belatedly delivered confirmatory affidavit by the Executive Mayor. The acting municipal manager averred that the MSDF 'must be read against the firm decision of the Council that residential use should not be allowed and that residential use should not be allowed and that the original vision of Techno Park should be further developed and promoted'. No evidence has been offered in support of that averment other than the differences between the draft MSDF and the adopted framework identified in the Mayor's statement of reasons quoted above and the zoning scheme provisions pertaining to TechnoPark. No detail has been provided as to the circumstances in which the changes to the draft were effected. There is nothing to indicate that they were effected in consequence of a debate in the council chamber and the adoption by the municipal council of amending resolutions. (The relevance of any such evidence, had it been adduced, is a question I shall discuss later.)

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[5] Section 12(1)(l) of SPLUMA.

[6] Section 12(1)(k) of SPLUMA.

[32] The answering papers merely indicate, with reference, to the minutes of an urgent meeting of the council held on 2 August 2019 at which the MSDF was adopted,[7] that a request had been made at the council meeting held on 12 June 2019 for there to be 'another public participation on the MSDF process with the closing date for comments on 5 July 2019'. The minutes also gave as a further reason for the special council meeting that 'a very important Statutory Inter-Governmental Steering Committee meeting took place 5 June 2019 to discuss certain inputs'. The minutes record 'Based on the above a special meeting was called for the approval of the Revised Stellenbosch Spatial Development Framework (SDF) after the extended public participation process'.

[33] The minutes record that a presentation was made on the document by the Director: Planning and Economic Development and the Manager: Spatial Planning and that during deliberations on the matter the Democratic Alliance requested and were permitted the opportunity to caucus. They record that '[w]hen the meeting resumed it was

RESOLVED (majority vote)

(a) that Council notes input and comments received on the Draft Municipal Spatial Development Framework attached as **ANNEXURE 1** of the agenda;

(b) that Council approves the final draft *m*SDF (sic) as attached as **ANNEXURE 1** to the agenda item; with the exclusion of Erf 1049/3 from the urban edge as this is currently zoned agriculture;

(c) that the final draft Municipal Spatial Development Framework be included in the 2019/20 Integrated Development Plan (IDP); and

(d) that the Municipal Manager be mandated to investigate the approvals (sic) of Brandwacht Hotel outside the urban edge and how this proposal was now included in the Brandwacht urban edge.

Cllr DA Hendrikse requested that his vote of dissent be minuted and that an Official confirmed that there is another zoning on the land apart from agriculture.'

(I read Cllr Hendrikse's dissent to relate to the exclusion of Erf 1049/3 from the urban edge.)

[7] Certain amendments to the adopted MSDF were approved by the municipal council in November 2019, but none of them appear to have any bearing on Technopark.

[34] None of the comments listed in Appendix B to the MSDF received in the extended public comment period in June-July related to Technopark. Although the Mayor's reasons suggest that a draft MSDF was submitted to the municipal council in July 2019, the minutes of the 2 August 2019 special meeting at which the MSDF was adopted suggest that the council's previous consideration of a draft MSDF had been on 12 June 2019.

[35] I have related the documented history at some length because of the first respondent's contention that it is relevant to the contextual consideration that should be an integral part of undertaking the construction of any document, including a statutory instrument. Appropriate attention to context has always been part of the interpretive undertaking. But in recent years there has been a sharpened focus on it following the rehearsal of applicable principle in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 (16 March 2012); [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) in para 18. As noted in an appeal court judgment handed down last year, '*Endumeni* has become a ritualised incantation in many submissions before the courts. It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations'.[8] The appeal court judgment proceeded to explain that 'Neither *Endumeni*, nor its reception in the Constitutional Court, most recently in *University of Johannesburg*,[9] evince skepticism that the words and terms used in a contract have meaning. *Endumeni* simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a

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[8] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99 (9 July 2021); [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) at para 49.

[9] *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13 (11 June 2021); 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC).

predetermined result. Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.'[10]

[36] *Endumeni*, *University of Johannesburg* and *Capitec* were matters in which the interpretation of contracts was in issue. Whilst there is undeniably a concurrence of applicable principle in respect of the interpretation of written contracts and statutory instruments, I think that when it comes to determining the bounds of relevant context that might be taken into account in deciding on the meaning of the text in issue there is an important difference.

[37] In the contractual context, the enquiry into the meaning of the text is directed at determining, within the limits defined by the language that they have chosen to use, what the parties to the deed – the persons who adopted the text – mutually intended.[11] In the statutory context, the enquiry must be into what the effect of the text is on the citizen, who was not party to its articulation.

[38] In my view, the distinction has a bearing on the readiness with which reference may properly be had to contextual evidence outside of that provided by the instrument itself for the purpose of interpreting it. Acknowledging the more expansive role afforded to contextual evidence in the interpretation of contracts on the approach adopted in *University of Johannesburg*, there has to be a greater emphasis on objectivism in the interpretation of statutory instruments. Rule of law considerations require that statutory text should speak for itself. The rule of law would be undermined if persons bound by a statute were expected to dig into its drafting history to find out whether it really bears the meaning that its language conveys or if government were able, relying on its drafting history, to apply it in a manner inconsistent with the language of the promulgated instrument.

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[10] *Capitec* supra, at para 49-51.

[11] Cf. *University of Johannesburg* supra, at para 67.

[39] I should not be understood to imply that that excludes consideration in appropriate circumstances of the text with attention to the historical background of the legislation. On the contrary, that is frequently done to obtain clarity when considering the meaning of the text in a statute which is the current iteration of subject matter dealt with in one or more of its statutory predecessors. The comparative texts used in such circumstances are material that was duly promulgated and therefore readily available to anyone seeking to ascertain clarity on the meaning of the text of the related current statute. They are distinguishable from material such as the transcripts of legislative debates, reports of legislative committees and bills or drafts – matter covered by the term *travaux préparatoires*.[12] As the case law shows,[13] there is a long history of judicial resistance to the admissibility of *travaux préparatoires* in statutory interpretation. Commenting on what is described as a more relaxed approach to the use of *travaux préparatoires* by the Constitutional Court in *S v Makwanyane and Another* [1995] ZACC 3; (6 June 1995) 1995 (6) BCLR 665; 1995 (3) SA 391; 1995 (2) SACR 1 from para 20, LAWSA comments 'The court did not, however, profess to deduce the possible meaning content of specific constitutional provisions from this background evidence and moreover gleaned the evidence from a fairly "objective" source, namely reports of a technical committee advising the constitution makers. The court refrained from expressing an opinion as to whether reliance on "background evidence" would be admissible in the construction of enacted instruments other than the interim constitution. In short, the circumspect reliance on background material in the *Makwayane* case is consistent with the observation that genetic interpretation is not relied on as a primary method of (constitutional) construction, but rather serves to confirm results arrived at through other methods'.[14] As I understand the position, Chaskalson P went no further in *Makwanyane* than to venture (rather than hold) that in issues of statutory interpretation in general (as distinct from constitutional interpretation) reference to preparatory

[12] *French*: preparatory works.

[13] Cf. LAWSA Second Edition vol. 25(1), LM Du Plessis 'Statute Law and Interpretation' at para 374 and the authorities cited there. See also *Minister of Health and Another N.O. v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) at para 199-201.

[14] Id.

material should be permitted as an aid to construction which is ambiguous or obscure or the literal meaning of which leads to an absurdity.[15] Reference was made in this regard to *Pepper (Inspector of Taxes) v Hart and related appeals* [1993] 1 All ER 42 (HL) and also to New Zealand and Australian authority.

[40] In my judgment, the appeal authority was obliged to construe the MSDF with reference to the gazetted text. The Executive Mayor was not permitted to resort to the text of earlier drafts to interpret the gazetted text in a manner that led her to give it a meaning inconsistent with the language actually used. The MSDF is not a statute, but it is evident from its legislative context described earlier, that it has a similarly binding effect on the municipality and the users and developers of land within its territorial jurisdiction, and it is therefore appropriate to apply the principles of statutory interpretation when construing its provisions. The interpretative approach used by the Executive Mayor is at odds with the statutory enjoinder that a spatial development framework must 'provide clear and accessible information to the public and private sector and provide direction for investment purposes'.

[41] The fact that certain of the text that was included in the draft texts has been omitted in the adopted text does not alter the meaning of the language used in the adopted text. The passages in the 'operative' parts of the MSDF, in the passages in Sections 5 and 6 thereof discussed at paragraphs [17] to [21] are plainly not irreconcilable with the possibility of some degree of residential development in Technopark. This would have been evident to the appeal authority had she adopted a proper approach to the interpretation of the MSDF. The flawed approach to the construction of the document that was adopted resulted in the Executive Mayor deciding the appeal having regard to irrelevant considerations, while at the same time failing to have regard to the relevant ones.

[42] It also bears mention that the fact that residential use is not one of the land uses permitted in terms of the zoning scheme is not a determinative consideration. An application for rezoning arises only when the contemplated land use is not one of those permitted by the applicable land use scheme on the land in question. The question is whether in the peculiar circumstances a change to the currently applicable zoning

[15] See *Makwayane* at para 12-17.

should be allowed. It falls to be answered upon a consideration of the given facts in the light of the factors to which regard must be had in terms of s 65 of Stellenbosch Municipality Planning Bylaw of 2015.[16]

[43] The application for the judicial review and setting aside of the appeal authority's decision will consequently be upheld.

[44] An order will issue in the following terms:

1. Insofar as necessary, the period of 180 days referred to in section 7(1)(a) of the Promotion of Administrative Justice Act 3 of 2000 is extended in terms of section 9(1) of the said Act until the date upon which the application in case no. 10240/2020 was served on the respondents.
2. The decision of the second respondent dated 3 February 2020 confirming the decision of the Stellenbosch Municipal Planning Tribunal to refuse the applicant's application for the rezoning of Erf 13500 Stellenbosch is reviewed and set aside.
3. The applicant's appeal against the Municipal Planning Tribunal's decision is remitted to the second respondent for reconsideration in the light of the judgment in case no. 10240/2020.
4. The first respondent shall be liable for the applicant's costs of suit.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	**K. Reynolds**
Applicant's attorneys:	**Hofmeyr Attorneys** **Somerset West**

[16] Quoted in paragraph [7] above.

	Van der Spuy Attorneys **Cape Town**
Respondents' counsel:	**A. De Wet**
Respondents' attorneys:	**Rufus Dercksen Inc.** **Stellenbosch**
	Bisset Boehmke McBlain **Cape Town**